No. 15696.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MARTY W. LANDAU, doing business as RIVERSIDE RANCHO,

Appellant,

vs.

ROBERT A. RIDDELL, individually, and as District Director of Internal Revenue for the Sixth District of California,

Appellee.

BRIEF FOR APPELLANT.

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BRIEF FOR APPELLANT.

This proceeding involves Excise Taxes, particularly so-called "cabaret taxes" paid by Appellant to Appellee between the first day of December, 1949, and the 31st day of December, 1951, under Section 1700(e) of the Internal Revenue Code of the United States of America, amounting to the total sum of $19,590.93, which amounts were paid under protest [Tr. of R. p. 33] for the reason that such cabaret taxes were not legally due from Appellant because of the fact that Appellant was not, during said times, operating a cabaret and which taxes were claimed for refund by Appellant under written claim for refund filed by Appellant with Appellee on or about January 25, 1954; and also involves similar taxes assessed by Appellee against Appellant for the period from October, 1950, through October, 1951, in the sum of $4,450.00, together with penalties and interest allegedly due under the above quoted section, and for which Appellee filed his Complaint in Intervention herein.

The case was heard in the United States District Court, Southern District of California, Central Division, before

Judge Leon R. Yankwich on April 29, 1957, and was submitted for adjudication upon a Partial Stipulation of Facts, the oral testimony of Appellant on behalf of the Appellant, and oral testimony of Bernard Jefferson Irvine O'Connor on behalf of Appellee, and various exhibits introduced and received in evidence.

Issues to Be Decided.

Whether Appellant was proprietor of "a roof garden, cabaret, or similar place" as such term is used in Section 1700(e) of the Internal Revenue Code of 1939, as amended.

Whether the taxes paid by Appellant under protest were legally due from him.

Whether the taxes demanded by Appellee are legally due from Appellant.

Whether the action of Congress in enacting the Revenue Act of 1951 changed the law or merely clarified the prior statute.

Whether the Commissioner of Internal Revenue exceeded his authority in arbitrarily, and without the approval of the Secretary of the Treasury, seeking to have the effect of his unpublished change in his long continued interpretation of his Regulations (Letter of Deputy Commissioner Valaer dated January 19, 1951) go back over previous years during which the appellant operated under the Regulations then in force.

Points Relied on by Appellant.

Appellant has designated, as the points on which he intends to rely in this appeal, the following:

(1) That the taxpayer was not the proprietor or the owner of an establishment coming with the term "roof garden, cabaret, or similar place" as such term is used in Section 1700(e) of the Internal Revenue Code (1939) as amended.

(2) That under the regulations of the Commissioner of Internal Revenue issued pursuant to the Revenue Act of 1941, which amended Section 1700(e), the Commissioner interpreted said section as excluding dance halls, and ballrooms similar to that conducted by the Appellant from the provisions of said section.

(3) That the cabaret tax was not imposed as a direct tax on the proprietor or owner of a cabaret, roof garden, or similar place. Under the provisions of the Internal Revenue Code he was charged with the duty of returning all payments of such taxes received by him. When the Commissioner of Internal Revenue, or his delegate, by issuing a letter in January, 1951, informing all Collectors of Internal Revenue of the change in his interpretation of Section 1700(e), Internal Revenue Code (1939), as amended, declared that such ruling should be applied retroactively, he penalized all owners and proprietors of dance halls, and ballrooms, similar to that operated by the taxpayer (appellant), who had failed to collect a cabaret tax from their patrons, because of their reliance upon the Commissioner's long standing interpretation of the intent and purpose of Congress, under which he had declared that no cabaret tax was due from them.

(4) That the Commissioner has not published in his Internal Revenue Bulletins or his Cumulative Bulletins any change in the regulations promulgated by him under the provisions of the Internal Revenue Act of 1941, setting forth his interpretation of Section 1700(e) of the Internal Revenue Code of 1939, as amended by the Revenue Act of 1941.

(5) That Congress, speaking through the members of the House Ways and Means Committee and the Senate Finance Committee, on the Revenue Act of

1951, declared that it was its intent and purpose in the passage of Section 1700(e) of the Revenue Code of 1939, as amended in 1941, that dance halls and ballrooms similar to that conducted by the taxpayer were not included within the meaning of the term "roof garden, cabaret, or similar place."

(6) That the action of the Congress in relation to said Section 1700(e) was not a change or amendment of the law as set forth in said section, but was merely a declaration and clarification of the existing law.

Appellant's Statement of Facts.

I. Appellant was the operator of an establishment known as "Riverside Rancho" which is located at 3213 Riverside Drive, Los Angeles, California;

II. The physical layout of the "Riverside Rancho" was as follows:

(1) The entire area within which was located the establishment herein involved was bounded on all sides by a wooden fence approximately seven feet high. Sketch of layout of Riverside Rancho premises Exhibit "B" in evidence, and Exhibit "C" photographs, marked on the reverse side, as follows:

1800-149; 776-2189; 776-2190; 776-2192; 1771-30; 1800-148; 776-2195; 776-2194; 776-2193; 776-2191.

(2) All other pertinent items of description of the establishment are contained in the Stipulation of Facts [Tr. of R. pp. 60-65, incl.]; and shown by testimony of Mr. Landau on direct examination [Tr. of R. pp. 39-41].

III. The method of operation of Appellant's dance hall [Tr. of R. pp. 61-65 incl.].

IV. Appellant's payment of the taxes, the subject of this proceeding, and the fact of their payment under protest is shown [Tr. of R. p. 33]. The payment of the taxes out of Appellant's own pocket [Tr. of R. p. 36].

ARGUMENT.

(1) The Taxpayer Was Not the Proprietor, or Owner, of an Establishment Coming Within the Term "Roof Garden, Cabaret, or Similar Place" as Such Term Is Used in Section 1700(e) of the Internal Revenue Code of 1939, as Amended.

The word "cabaret" is of French origin, although it has been in use in English-speaking countries for more than two hundred years (Oxford English Dictionary (Second Edition)).

In Webster's New International Dictionary (Second Edition), the word is defined as "A cafe or restaurant where patrons are entertained by performers who dance and sing after the practice of certain French taverns."

In the Universal Dictionary of the English Language, the word is defined as "Small drinking place or night restaurant in which singing or dancing performances are given."

And in a Dictionary of American-English, the word "cabaret" is defined as "A restaurant which provides entertainment by singers, dancers, etc."

The term "roof garden" is defined as "A garden on a flat top of a building; especially a garden where refreshments are served, on the roof of a high building, often with a stage for entertainment."

A careful consideration of the legislative history of the statute in question, hereinafter reviewed, leaves little doubt but that Congress used the term "roof garden" to define the word "cabaret" more precisely.

In the case of *Geer, et al. v. Birmingham* (U. S. D. C., Northern Dist. of Iowa), 88 Fed. Supp. 189 at 193-194 (Jan. 10, 1950), considerable evidence was introduced by the plaintiffs (taxpayers) of an oral and documentary na-

ture. Among the witnesses who testified with respect to this phase of the case were: The District Manager for the States of Iowa, Kansas, and Nebraska, for the American Society of Composers; the traveling representative of the American Federation of Musicians whose territory included ten midwestern states; another witness was in charge of orchestra bookings in eleven midwestern and western states; other witneses included the Chicago representative of "Billboard," an amusement trade journal having a national circulation, and operators of ballrooms in Iowa and a number of other states. The Court found that all of the witnesses referred to "were thoroughly familiar with the operation of ballrooms and cabarets locally, sectionally, and nationally."

From the testimony of those witnesses the Court arrived at the opinion that, in the amusement trade, the term "night club" is customarily and ordinarily used as a synonym for "cabaret" (p. 194). And reference was made to the New Dictionary (1947) wherein the word "cabaret" is defined as "A night club featuring entertainment by singers and dancers" (p. 194).

Ballrooms and cabarets have many different characteristics, a comparison of which discloses the complete lack of similarity (pp. 194-195) as shown in the table following:

CABARETS.	BALLROOMS.
ce of Dance Floor: 15′ x 15′* (225 square feet).	1500 sq. feet to 5000 sq. feet
ating: Provided for all of its patrons, and only admits those it can seat.	Provides seating for only a comparatively small number of its patrons, generally not exceeding 20%. The appellant provided no tables or chairs in his ballroom, only benches lining three sides of such room.
ntertainment: Has entertainment separate and distinct from the dance orchestra music.	Except on rare occasions, a ballroom provides no entertainment separate and distinct from the dance music. In the appellant's case, entertainment was not furnished, separate and distinct from the dance music.
dmission: Cabarets do not maintain box offices, and do not sell tickets for admission.	Ballrooms have box offices where patrons purchase a ticket of admission, and no patrons are admitted without a ticket. Admission to the Appellant's ballroom was by ticket only, which had to be purchased at the box office, located at the entrance.
Prices Charged: Greatly in excess of those charged by ordinary establishments vending food and drinks.	Prices comparable with those charged in ordinary retail outlets. This was true with respect to prices charged by the appellant.
Receipts: Derived to a great extent from proceeds of sale of food and drinks. Only a small percentage of cabaret patrons make use of the dancing privileges afforded. Most patrons patronize these establishments for purposes other than dancing—to see the show and partake of food and drinks.	The greater part of receipts derived from the sale of admission tickets for dancing privileges. It is not usual for a person to buy an admission ticket to a ballroom and not dance, since the primary purpose of those attending ballrooms is to dance.

*The District Manager for the American Society of Composers, Authors, and Publishers, testified in *Geer, et al. v. Birmingham, supra,* that the largest cabaret dance floor in his territory was about 15′ x 30′ (450 sq. feet).

Ballrooms are classified as distinct from cabarets by the American Federation of Musicians, and by the American Society of Composers, Authors and Publishers (p. 195). Operators of cabarets are not eligible for membership in the National Ballroom Operators' Association. In the amusement trade periodical, "Billboard," ballrooms and cabarets are dealt with and covered in separate sections because operators of cabarets are not interested in items pertaining to ballrooms, and the owners of ballrooms are not interested in items pertaining to cabarets.

In the case of *Birmingham v. Geer, et al.* (C. C. A. 8th Cir.), 185 F. 2d 82 at 84, the Court said:

> "He (Government Counsel) concedes that the Laramar Ballroom (Taxpayer's Establishment) is not a cabaret within the generally understood meaning of that term."

The legislative history of the statute imposing a tax on "cabarets, roof gardens, and similar places" plainly discloses that Congress recognized the difference between those establishments, and ballrooms and dance halls. And it is only reasonable to assume that Congress was aware of the fact that dance halls and ballrooms were not being made subject to the cabaret tax during a long period of years when it reenacted the statute imposing a tax on cabarets, etc., a number of times with minor charges having no bearing on the question presented herein.

The case of *White v. Aronson, Trustee* (Nov. 8, 1937), 302 U. S. 16, 58 S. Ct. 95, presented the question to the Supreme Court whether jigsaw puzzles were taxable as "games" under Section 609 of the Revenue Act of 1932.

The action was brought to recover $37,021.63 exacted of the bankrupt by the Collector of Internal Revenue on account of jigsaw puzzles manufactured and sold from June 21, 1932, to May 1, 1933.

The court below (C. C. A., 1st Cir.) after citing the definition of "puzzles" contained in Webster's New International Dictionary (2d Ed.), pointed out (p. 19) that:

> "A jig saw puzzle was never taxed under Section 900(5) of the Act of 1918. It was not taxed until after the passage of Section 609 of the Revenue Act of 1932, when the Government attempted to tax it as a game. The Act of 1932 became effective June 6, 1932. On August 26, 1932, the Commissioner issued a ruling stating that jig saw or die cut puzzles were not taxable. On November 14, 1932, he issued a ruling that they were taxable. On February 7, 1933, he ruled that after February 7, 1933, they were taxable if they contained more than fifty pieces. And on April 20, 1933, he ruled that they were taxable after June 21, 1932, if they contained more than fifty pieces."

In affirming the decision of the Circuit Court, which had decided the case in favor of the taxpayer, the Supreme Court (p. 20) said:

> "Ample evidence disclosed that in commercial usage jig saws were never regarded as games; also that the trade recognized a definite distinction between puzzles and games. We must assume that Congress had knowledge of these things; also knew that jig saw puzzles were not assessed for taxes under the Acts of 1917 and 1918; and further, was not unmindful of the uncertainties concerning the meaning of 'game' disclosed by Baltimore Talking Board Co. v. Miles, 280 Fed. 658 (at pp. 659-662), and Mills Novelty Co. v. United States, 50 F. (2d) 476.
>
> "The claim for the taxpayer does not rest upon an exception to a general rule but upon the construction of general language found in the act.
>
> * * * * * * * *

"Where there is a reasonable doubt as to the meaning of a taxing act it should be construed most favorably to the taxpayer. Gould v. Gould, 245 U. S. 151. 'Tax laws, like all other laws, are made to be obeyed. They should therefore be intelligible to those who are expected to obey them.' Philadelphia Storage Battery Co. v. Lederer, 21 F. (2d) 320, 321, 322" (pp. 20-21).

"If any doubt could be deemed to exist . . . the doubt must be resolved in favor of the taxpayer (U. S. v. Merriam; 263 U. S. 179; 44 S. Ct. 69)." (P. 21.)

In the case of *Boackle v. United States* (D. C. Northern Dist. Ala. U. S. T. C. 56-2, #9986), the Court found that plaintiff operated a ballroom consisting of a bandstand, a dance floor, and to either side of the dance floor space where 55 to 60 tables were located which could seat approximately 275 persons; he charged admission to the ballroom; that plaintiff furnished approximately 400 chairs; but served no food but sold ice, soft drinks, potato chips, lemons, and beer; that plaintiff did not sell liquor but some of the dancers brought their own; that waiters were employed by plaintiff to serve set-ups; that plaintiff charged 30 or 35 cents for a bucket of ice, 35 cents for a package of cigarettes, 35 cents for beer. . . . The Court determined that the plaintiff was not subject to the cabaret tax provided by Section 1700(e), I. R. C., 1939, as premises operated by plaintiff is a ballroom within the meaning of said section. The Commissioner has not appealed from this decision.

In appellant's ballroom, no refreshments were sold or allowed, nor was any service of any kind provided therein. There were benches along the walls of the ballroom but no tables or chairs [Tr. of R. p. 63].

It is therefore apparent, that appellant's establishment was not a "roof garden, cabaret, or similar place" as defined in Section 1700(e), I. R. C., 1939, as amended.

(2) Under the Regulations of the Commissioner of Internal Revenue Issued Pursuant to the Revenue Act of 1941, Which Amended Section 1700(e), the Commissioner Interpreted Said Section as Excluding Dance Halls, and Ballrooms Similar to That Conducted by the Appellant From the Provisions of Said Section.

Section 1700(e)(1) of the Internal Revenue Code (1939), prior to amendment, provides for a tax on "the amount paid for admission to any place including admission by season ticket or summer subscription." The rate of this tax was fixed at one cent for each five cents or major fraction thereof.

Section 1700(e)(1) of the Internal Revenue Code (1939), as amended, provides for a tax on "all amounts paid for admission, refreshment, service, or merchandise, at any roof garden, cabaret, or similar place furnishing a public performance for profit, by or for any guest who is entitled to be present during any portion of such performance."

The history of Section 1700, Internal Revenue Code, *supra,* began in the year 1917, when Congress, for the first time, imposed a tax upon entertainment of various kinds. The report of the House Finance Committee on the bill which became the Revenue Act of 1917, stated:

> "It is recommended that this tax be imposed upon all places to which admission is charged, such as motion picture shows, theatres, circuses, entertainments, cabarets, ball games, athletic games, etc."

The difficulty of imposing this "admissions tax" upon the category of entertainment in existence at that time

known as "cabarets," which usually made no admission charge but rather included the price of admission in the price charged for refreshments, service, or merchandise, was brought to the attention of the Senate Finance Committee by the representative of the "Theatrical Managers' Association," who stressed the fact that the theatres' chief competitor, "and the single interest that has done more to detract from the theatrical patronage than anything else in the United States" was the cabaret.

As a result, the Senate Finance Committee recommended an amendment of the House bill embodying a provision that the tax on admissions to cabarets be computed at the rate of one cent for every ten cents paid for refreshments, etc. The said amendment stated that:

> "The purpose of this amendment is to impose a tax upon admissions to what are *commonly known as cabarets,* at the same rate as is imposed upon admissions to similar entertainments or amusements."

The Senate amendment was agreed to by the House of Representatives, and incorporated in the Revenue Act of 1917.

It would appear to be clear that the tax imposed by *Section 1700 of the Revenue Act of 1917, supra,* was an admission tax which had been enacted in two parts because of the particular nature of the operation of cabarets.

Treasury Decision 2603 was issued on or about December 4, 1917, and sought to establish a formula for the computation of the "admission tax" in the case of any *"cabaret or similar entertainment."* It provided, in substance, that 20% of the amount paid for refreshments, merchandise, service, etc., including any sum paid for seats and tables reserved or occupied, at any public performance for profit at any cabaret or other *similar entertainment,* to which the charge for admission is wholly, or

in part, included in the amount so paid, shall be regarded and deemed to be paid for admission to such performance.

An explanation of this rule for determining that proportion of the total charge of a cabaret or other similar entertainment which was attributable to the admissions charge of such establishment, as well as a recommendation that the tax be increased, was included in the Report of the House Ways and Means Committee, subsequently enacted as the Revenue Act of 1918. The use of the language "The tax upon admission to roof gardens, cabarets, and other similar entertainments is increased * * *," has been interpreted to be an attempt to delimit more precisely the term "cabaret."

The Revenue Acts of 1921, 1924, and 1926 made no changes, except as to the rate of tax, or exemption from tax on small admissions charges.

The first Treasury Regulations on the subject were issued in 1918. They were continued in subsequent years (1919, 1921, 1922 and 1924 editions). In 1926 that portion of Treasury Regulations 43, applicable to the tax on admissions to any public performance for profit at any roof garden, cabaret, or other similar entertainment contained the following:

> "*Art. 9*—Entertainments included. 'Any public performance for profit at any roof garden, cabaret, or other similar entertainment' includes every public vaudeville, or other performance or diversion in the way of acting, singing, declamation, or dancing, either with or without instrumental music, conducted for the profit of the management by professionals, amateurs, or patrons under the auspices of the management, in connection with the service or selling of food or other refreshment or merchandise at any room in any hotel, restaurant, hall or other public place * * *."

Then follows a series of examples (7), only one of which is pertinent to the instant discussion, which reads:

> "(2) A certain hotel provides a space *in* its dining room for dancing and charges $1.00 admission to everyone entering the room. The prices charged for food are not increased to cover the cost of the entertainment furnished. In this case the amount paid for admission is not included in the price paid for refreshment but is this separate $1.00 charge. This charge, therefore, is taxable as an 'amount paid for admission under Section 500(a)(1) of the Act and the tax is ten cents. (See Art. 1.)"

It has generally been considered by writers on this subject that the Treasury Department in the issuance of these 1926 Regulations, had the same intent as did Congress in regard to the taxing of roof gardens, cabarets, and similar entertainments, *i. e.,*

> "to insure that such types of entertainment would pay an admissions tax upon what would be a fair and reasonable admission in comparison with the other charges they imposed, whether such amount was charged to their patrons as an ordinary admission, or was disguised in the price patrons had to pay for refreshment, service, or merchandise."

Under the 1926 Regulations, the operator of a roof garden, cabaret, or other similar entertainment furnishing a public performance for profit could pay an admission tax under Section 500(a)(1) of the general admissions tax section of the 1926 Revenue Act, on any direct admissions charge imposed and also be subject to tax under Section 500(a)(5), the roof garden and cabaret tax section, for a tax on those charges he made for refreshment, service, or merchandise, *if the admission charge was considered inadequate, or if the charges for refreshment, service,*

or merchandise, were increased DURING THE PERIOD OF THE ENTERTAINMENT.

This interpretation by the Treasury Department's official regulations seems to be in line with the indicated intent of Congress to impose an admissions tax upon that portion of the charges made by a roof garden, cabaret, or other similar entertainment which could fairly be attributable to an admissions charge, regardless of the form in which the charge by such establishment was made. Also, that the Treasury Department, as well as Congress, apparently realized that there was a problem peculiar to roof gardens, cabarets, and the like, which was not present in the case of the usual place of amusement imposing a direct admissions tax, such as a theatre, skating rink, dance hall, opera, and the like.

The Revenue Acts of 1928, 1932, 1936 and 1938 effected only minor changes in Section 500(a)(5) of the Revenue Act of 1926, none of which has any bearing on the issue involved herein.

Treasury Regulations 43, issued under the provisions of the Revenue Act of 1926 remained the same for 1927. In 1930, Articles 8 and 9 of Regulations 43 became Articles 10 and 11, of Regulations 43. Example 2 under Article 8, and examples 2 (as set forth above) and 7, under Article 9 were omitted from the said Regulations.

It would seem that the Bureau of Internal Revenue recognized the distinction between the ordinary admission charge made by a theatre, dance hall, skating rink, and the like, and the type of admission charge made by a cabaret, or similar place, as evidenced by its rulings: S. T. 726, CB XIII-1 (1934); P. 431; S. T. 799, CB XIV-1 (1935) 420; and T. D. 4749, CB 1937-2, 519-520.

While the Regulations promulgated by the Commissioner of Internal Revenue, with the approval of the Sec-

retary of the Treasury, were revised from time to time, to omit certain examples contained in earlier editions, and to add one or two new ones, there was no change in the prescribed method of computing the tax on admissions to cabarets, and similar places, from 1930 until 1941, when Congress decided to change the method of computing the cabaret tax under Section 1700(e) and the corresponding regulations.

The House Ways and Means Committee, in its report prepared to accompany the Revenue Bill of 1941, referred to the "serious administrative difficulties" encountered by the Bureau in seeking to collect the tax imposed by Section 1700(e), in the case of hotel dining rooms wherein music and dancing were furnished in connection with the serving of food, and no admission charge was imposed, either directly, by a direct charge, or indirectly, by including the charge for such music and dancing privileges in the price of food. (See *United States v. Broadmoor Hotel Co.* (D. C.—Colo., 1929), 30 F. 2d 440; also, *Deshler Hotel Co. v. Busey* (D. C. S. D. Ohio, 1941), 36 Fed. Supp. 392; affirmed C. C. A. 6th Cir., *Busey v. Deshler Hotel Co.,* 130 F. 2d 187, 192.)

In accordance with the House and Senate Committee Reports on the Revenue Bill of 1941, the basis for the computation of the "cabaret tax" was changed to read as follows:

> "(e) Tax on Cabarets, Roof Gardens, etc.
>
> "(1) Rate.—A tax equivalent to 5 per centum of all amounts paid for admission, refreshment, service, and merchandise, at any roof garden, cabaret, or other similar place furnishing a public performance for profit, if any payment, or part thereof, for admission, refreshment, service, or merchandise, entitles the patron to be present during any portion of such performance."

Thus, for the first time, since a tax on these types of entertainment was imposed in 1917, that portion of the statute imposing a tax on cabarets, roof gardens, or similar entertainments, no longer needed to be supplemented by that portion of the statute taxing admissions generally, inasmuch as Section 1700(e) (the "cabaret tax" section) now contained both a different rate and a different base than Section 1700(a), the "admissions tax" section, and was designed to tax any charge made by a cabaret, roof garden, or similar place, in whatever form such charges were imposed.

Section 542 of the Revenue Act of 1941 amended Section 1700(e) of the Internal Revenue Code to include the following new provisions:

> "(e) Tax on Cabarets, Roof Gardens, etc.
>
> "(1) Rate * * *
>
> "(2) By whom paid.—The tax imposed under paragraph (1) shall be returned and paid by the person receiving such payments."

The discussions of the tax on cabarets contained in the House Ways and Means Committee Report, and the Senate Finance Committee Report, on the Revenue Bill of 1941, disclose that this change in the existing statute was made in order to overcome difficulties encountered in collecting the tax.

After the enactment of the Revenue Act of 1941, the Commissioner of Internal Revenue issued a memorandum letter dated September 26, 1941, to all of the Collectors of Internal Revenue throughout the country which memorandum was published in Internal Revenue Cumulative Bulletin 1941-1942, page 260, as Mimeograph 5255, summarizing the changes effected by the Revenue Act of 1941, amending Section 1700(a) of the Internal Revenue Code, imposing a tax on amounts paid for admission to any place, and by the amendment of Section 1700(e) which

imposed a tax on amounts charged at cabarets, roof gardens, and similar places.

The portions of said Mimeograph 5255 deemed pertinent to the instant proceeding, read as follows:

> "This tax is not required to be collected from the patron, as heretofore, but there is no objection to the cabaret, etc., passing it on to the patron if billed separately and in the exact amount. (Section 542 effected these changes.)
>
> "Since there are a number of motion picture theatres, skating rinks, dance halls, etc., the admissions to which were not taxable before October 1, 1941, but will be taxable on that date, and thereafter, appropriate information should be circulated to such theatres, skating rinks, dance halls, etc., at the earliest practicable moment; and they should be advised that all admission charges are subject to the tax except in the case of admissions of less than ten cents charged to children under 12 years of age."

At the time Congress enacted the Revenue Act of 1943, and in the Report of the House Ways and Means Committee, on that Revenue Bill, cabarets were singled out in the following statement:

> "With the exception of a few roadhouses that have been hurt by the gasoline shortage, cabarets have been experiencing an unprecedented demand for their entertainment services. It is felt that this is more of a luxury than those services which are subject to the general admissions tax * * *."

It was proposed to increase the tax on cabarets from 5% to 30%, which proposal was subsequently adopted. In 1944, the rate was reduced to 20%.

During the years from 1941 through March, 1947, in response to requests from Collectors of Internal Revenue, and/or owners and proprietors of dance halls, and ball-

rooms, operated in a manner similar to that of the appellant herein, the Commissioner, or his delegate, issued numerous rulings in which these persons were notified that the particular establishment was not taxable as a cabaret, or similar place.

In the case of *Geer, et al. v. Birmingham* (U. S. D. C. Northern Dist. of Iowa), 68 Fed. Supp. 189, a number of such letters issued during the years 1942 to 1947, inclusive, over the signatures of the Deputy Commissioner, Miscellaneous Tax Unit, U. S. Bureau of Internal Revenue, and those of Chiefs of the Miscellaneous Tax Divisions of the various field offices of the Bureau of Internal Revenue, were received in evidence, and have been included in the published report of that case (pp. 215-220 incl.).

One of such letters received in evidence in *Geer v. Birmingham, supra,* was dated September 21, 1944, and addressed to Larry Geer, Manager, Laramore Ballroom, informing him his establishment was not taxable as a cabaret or similar place (p. 219).

A reading of those letters will disclose that, in each case ruled upon, the refreshments were served within the ballroom, or dance hall.

In the instant case, no refreshments were sold or served within the ballroom, nor were they allowed to be carried into the same. There were no tables or chairs available for this purpose, and only benches extending along certain of the walls of the ballroom were provided for the convenience of patrons of the appellant's establishment, for resting between dances, and during intermission.

Anyone purchasing a ticket for admission to the Appellant's ballroom, upon which an admission tax was collected, as required by Section 1700(a) of the Internal Revenue Code (1939), was entitled to all of the privileges of the ballroom. Such patrons were not required to purchase any refreshments, or other merchandise.

On the other hand, no sum, however large, expended for food, refreshments, merchandise, etc., would entitle such purchaser to enter the ballroom without first purchasing a ticket of admission, at the window regularly maintained for that purpose and paying the Federal admission tax thereon.

The earliest of the rulings issued by the Commissioner of Internal Revenue, which was received in evidence by the Court, in *Geer, et al. v. Birmingham, supra,* (p. 220) was released under date of December 18, 1942, to the operator of a ballroom at Lincoln, Nebraska, known as the Turnpike Casino. At that time, the rate of the so-called "cabaret tax" was 5% while the tax on admissions was 10%. The operator of the said ballroom sought to have his establishment classified as a cabaret. His request was denied in a letter directed to him by the then Collector of Internal Revenue. The pertinent portion of his letter reads as follows:

> "This office must be guided by the rulings issued by the Commissioner of Internal Revenue. The rulings which have been issued to date leave no question as to the taxability of your establishment. There seems to be no possible reason for taxing the Turnpike Casino on the basis of a cabaret tax rather than on the admissions tax basis."

No change in the law (Section 1700(e)(2) of the Internal Revenue Code, as amended by the Revenue Act of 1941), was made by the succeeding Acts of 1943, 1945, 1946, and the Excise Tax Act of 1947, which disclosed any dissatisfaction, on the part of Congress, with the Executive Branch of the Government's interpretation of that statute during such period of years.

And, since Congress, during those years, was seeking means of obtaining additional revenue, it is only reasonable to credit that legislative body with full knowledge of the

Commissioner's interpretation of the Regulations issued by him, under authority of Section 1700(e)(2), and the many rulings issued by him, or his delegates throughout the country, to taxpayers who operated dance halls, and/or ballrooms, in a manner similar to that of the Appellant, advising them that they were not subject to the cabaret tax imposed by Section 1700(e)(2) of the Internal Revenue Code, as amended.

If Congress was not satisfied with the then interpretations by the Commissioner, of the statute imposing a tax on cabarets, or, if in its desire to obtain additional revenue, it was of the opinion that the application of such tax should be extended to dance halls and/or ballrooms where any refreshments were sold, it would have been a very simple matter for it to amend the Internal Revenue Code to accomplish such result.

The latest ruling of the Commissioner of Internal Revenue included in the findings of the trial court in *Geer v. Birmingham, supra,* (p. 216) was issued to Miss Alice McMahon, (March 7, 1947) notifying her that her establishment was not subject to the cabaret tax.

About the same time that the ruling was issued to Miss McMahon, the Commissioner, or his delegate, challenged the correctness of his long standing interpretation of the Regulations promulgated by him relating to Section 1700(e) of the Internal Revenue Code, which had been approved by the Secretary of the Treasury, and the lengthy series of rulings issued by him to Collectors of Internal Revenue, and proprietors of dance halls and ballrooms where refreshments were served, by seeking to collect a cabaret tax from proprietors of dance halls and ballrooms located within a small group of states within the United States, some of whom had previously been advised by him that they were not subject to such tax. These, apparently, were selected as a testing ground.

Since the Commissioner did not publish any notice of his tentative change in his interpretation of the Bureau of Internal Revenue Regulations, it is not known when, or how, the revision was made known to the Collectors of Internal Revenue in those states lying within the boundaries of the 7th and 8th Circuit Court of Appeals.

The authority of the Commissioner to extend the application of Section 1700(e)(1) I. R. C. (1939), as amended, to all dance halls and ballrooms which served food, or refreshments, was contested by the Avalon Amusement Corporation, which case was decided against it. (*Avalon Amusement Corporation v. United States* (D. C. Wis.), 73 Fed. Supp. 328.)

It is, perhaps, unfortunate, that the U. S. District Court, in the *Avalon* case, was not informed that the Commissioner had not made a change in his Regulations interpreting Section 1700(e)(2) I. R. C., which Regulation had been in full force and effect for a long period of years, since such change would have required the approval of the Secretary of the Treasury; also, that the proposed change in his interpretation was not published in the Internal Revenue Bulletin Service. Further, that the Court had no knowledge of the many rulings which he had issued to taxpayers operating ballroom and dance hall establishments conducted in a manner similar to that of the plaintiff, to, and including March 7, 1947, informing them that they were not subject to tax as cabarets, roof gardens, or similar places.

Likewise the Court was without the benefit of a complete history of the "cabaret tax" legislation, or a discussion of the generally accepted meaning of the words "cabaret" and "dance hall," and the distinctions recognized between the two types of establishments, such as was developed in the latter case of *Geer, et al. v. Birmingham,* 88 Fed Supp. 189, pp. 195-215, incl.

(3) The Cabaret Tax Was Not Imposed as a Direct Tax on the Proprietor or Owner of a Cabaret, Roof Garden, or Similar Place. Under the Provisions of the Internal Revenue Code He Was Charged With the Duty of Returning All Payments of Such Taxes Received by Him. When the Commissioner of Internal Revenue, or His Delegate, by Issuing a Letter in January, 1951, Informing All Collectors of Internal Revenue of the Change in His Interpretation of Section 1700(e), Internal Revenue Code (1939), as Amended, Declared That Such Ruling Should Be Applied Retroactively, He Penalized All Owners and Proprietors of Dance Halls, and Ballrooms, Similar to That Operated by the Taxpayer (Appellant), Who Had Failed to Collect a Cabaret Tax From Their Patrons, Because of Their Reliance Upon the Commissioner's Long Standing Interpretation of the Intent and Purpose of Congress, Under Which He Had Declared That No Cabaret Tax Was Due From Them.

The legislative history of Section 1700(e) of the Internal Revenue Code, (1939) as amended, clearly discloses that it was the intent and purpose of Congress, in enacting the statute, that the cabaret tax should be paid by the patron of the cabaret, roof garden, or similar place.

Because of the administrative difficulties which developed with respect to enforcing collection of the cabaret tax, Congress changed the law as follows:

Section 542 of the Revenue Act of 1941 revised the base of the present "cabaret" tax. Liability for the tax was imposed on the proprietor. The Report of the Senate Finance Committee contains the following statement with respect to the amendment:

> "The amendment merely shifts the legal incidence of the tax from the patron to the proprietor and

makes the proprietor primarily liable for the payment of the tax to the Government. There is nothing in the section which would prevent the taxpayer, the proprietor, from shifting the tax burden to his customer."

The Commissioner has recognized this, and in his instructions to Collectors of Internal Revenue, issued September 26, 1941, and published as Com. Mimeograph 5255, in Internal Revenue Bulletin 1941-2, page 260, said:

"This tax is not required to be collected from the patron, as heretofore, but there is no objection to the cabaret, etc. passing it on to the patron if billed separately and in the exact amount. (Section 542 effected these changes.)"

Under date of January 19, 1951, about three years after the Circuit Court of Appeals, 7th Circuit, had sustained the Government in the case of *Avalon Amusement Corporation,* the Deputy Commissioner of Internal Revenue, Charles J. Valaer, wrote to all Collectors of Internal Revenue to enforce the cabaret tax against dance hall operators. The letter reads, in part, as follows:

"Subsequent to the decision in the Avalon case it was the position of the Bureau that any dance hall which sold food or refreshments is liable for the cabaret tax and rulings have been to that effect. However, because of the fairly apparent indications that the decision in the Avalon case would be tested in further litigation, no action was taken by the office to publicize such position of the Bureau or to notify dance halls generally of their liability for the cabaret tax, except in response to specific requests for rulings. In view of the concurring court decision in the Geer case, it is now believed advisable to publicize the Bureau's position on this matter."

Deputy Commissioner Valaer's letter, from which the above quotation is taken, was not published in the Internal Revenue Cumulative Bulletin for 1951, probably because about 17 days thereafter, and on February 5, 1951, the House Ways and Means Committee met to consider the bill which was to be known as the Revenue Act of 1951.

The Circuit Court of Appeals, 3rd Circuit, in its opinion rendered in the case of *The Lesavoy Foundation v. Commissioner,* 238 F. 2d 589 (1957), stated (p. 591) that:

> "We quite realize that the Commissioner may change his mind when he believes he has made a mistake in a matter of fact or law. Our own decision in Keystone Automobile Club v. Commissioner, 181 Fed (2d) 402 (3d Cir. 1950) recognizes this point fully and that point is sustained by abundant authority. But it is quite a different matter to say that having once changed his mind the Commissioner may arbitrarily and without limit have the effect of that change go back over previous years during which the taxpayer operated under the previous ruling."

It is certain that the proprietors of cabarets, roof gardens, and similar places, since they were to be held liable for the collection of the cabaret tax, in any event, took steps to collect the tax from their patrons, in order to avoid being penalized for failing to do so.

The operators of ballrooms and dance halls, in most instances, were not in as fortunate position, since having relied upon the Commissioner's Excise Tax Regulations, and/or his rulings, they did not collect a cabaret tax from their patrons, and were severly penalized when demand was made upon them, and a tax exacted equal to the amount which it was held they should have collected, even though the Commissioner had never published a notice of the change in his interpretation of his Regulations which had been in force for a long period of years.

The trial court has referred to the case of *Automobile Club of Michigan v. Commissioner,* 353 U. S. 180; 77 S. Ct. 707, with respect to the authority of the Commissioner to make his rulings retroactive.

It is clearly inapplicable to the instant case.

In the case of *Automobile Club of Michigan, supra,* the taxpayer did not deny that it was not entitled to exemption from the payment of Federal income taxes, under a reasonable interpretation of the statute, but contended that the Commissioner was without authority to apply the change in his ruling retroactively.

The Commissioner had ruled in 1934, and in 1938, that the taxpayer was entitled to exemption from Federal income taxes, as a social club. In 1945 he again reviewed the facts and determined that his former rulings had been incorrect. As a result, he revoked the ruling, and made such revocation retroactive to the years 1943 and 1944.

It was found by the Court that the action of the Commissioner resulted from a General Counsel's Memorandum (G. C. M. 23688) *published in Cumulative Bulletin 1943, at page 283) interpreting Section 101(9), I. R. C. (1939)* to be inapplicable to organizations similar to that of the Automobile Club of Michigan. The Commissioner adopted the General Counsel's interpretation and proceeded to apply it, effective from 1943, *indiscriminately to automobile clubs.*

The Court, in its opinion, (p. 185) observed that the Regulations in the *Automobile Club of Michigan* case in no wise purported to determine whether any organization was, or was not exempt. And that:

> "These Regulations did not provide the exemption, or interpret Section 101(9) but merely specified the necessary information required to be filed in order that the Commissioner might rule whether or not the taxpayer was entitled to exemption. This is not a

> case of an administrative construction embodied in the regulations which, by repeated reenactment of Section 101(9) * * * Congress must be taken to have approved * * * and thereby to have given the force of law. Helvering v. Reynolds, 306 U. S. at 114, 115."

In the instant case the taxpayer, having relied on the Commissioner's published regulations, was severely penalized when he was required to pay the taxes out of his own pocket [Tr. of R. p. 36] long after the possibility of collecting the taxes from his customers had passed.

(4) The Commissioner Has Not Published in His Internal Revenue Bulletins or His Cumulative Bulletins Any Change in the Regulations Promulgated by Him Under the Provisions of the Internal Revenue Act of 1941, Setting Forth His Interpretation of Section 1700(e) of the Internal Revenue Code of 1939, as Amended by the Revenue Act of 1941.

The Internal Revenue Bulletins are the official publications of the U. S. Treasury Department, and the Bureau of Internal Revenue. They are issued at regular intervals throughout the year, and their contents consolidated in what are designated Cumulative Bulletins which cover a period of six months, or twelve months, depending upon the volume of matter to be included.

Each of such Cumulative Bulletins contains the following paragraphs:

> "Internal Revenue Bulletin (Period covered by the particular bulletin) in addition to all decisions of the Treasury Department (called Treasury Decisions) pertaining to Internal Revenue matters, contains opinions of the Chief Counsel for the Bureau of Internal Revenue, rulings and decisions pertaining to income,

estate, sales, excess profits, employment, social security, and miscellaneous* taxes and legislation affecting the revenue statutes, as indicated on the title page of this Bulletin * * *.

"The rulings reported in the Internal Revenue Bulletin are for the information of taxpayers and their counsel as showing the trend of official opinion in the administration of the Bureau of Internal Revenue; the rulings other than Treasury Decisions have none of the force or effect of Treasury Decisions and do not commit the Department to any interpretation of law which has not been formally approved and promulgated by the Secretary of the Treasury * * *.

"It is also the policy of the Bureau to publish all rulings or decisions which revoke, modify, amend, or effect in any manner whatsoever any published ruling or decision. * * * No unpublished ruling or decision will be cited or relied upon by any officer or employee of the Bureau as a precedent in the disposition of other cases."

Viewed in the light of the above-quoted paragraphs from the Internal Revenue Bulletin, it would appear evident that the Commissioner's tentative change in his interpretation of the Regulations which Regulations had been approved by the Secretary of the Treasury, published, and continued in force for a long period of years, without change, had not received the approval of the Secretary of the Treasury, and clearly did not have the force and effect of a Regulation, or even a published ruling.

Notwithstanding the instructions given to officers and employees of the Bureau with respect to citing, or relying upon, unpublished rulings or decisions, it seems to be clear

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*Cabaret tax and admissions tax come under this heading.

that both the Bureau officials, and the Court relied upon an unpublished ruling which had been declared to only a very small portion of the Bureau of Internal Revenue personnel.

Upon appeal to the Circuit Court of Appeals for the 7th Circuit, the decision of the U. S. District Court in *Avalon Amusement Corporation v. United States, supra,* was affirmed. 165 F. 2d 653 (January 28, 1948). In that case the Court declared that "An establishment charging admission for dancing privileges and where refreshments are sold in connection therewith is a 'roof garden, cabaret, or similar place.' "

The courts may look to the history of the Legislature upon the subject of which the statute treats . . . to determine the purpose that the Government sought to accomplish. (*Church of the Holy Trinity v. United States,* 143 U. S. 457; *Crosset Western Co. v. Commissioner, Circuit Court of Appeals, 3rd Circuit,* 155 F. 2d 433.)

Statutes levying taxes are not extended by implication beyond the clear import of the language used, and in the case of doubt are construed most strongly against the Government. (*Hecht v. Malley,* 265 U. S. 144 at p. 156; 44 S. Ct. 462 (p. 156).)

There is no reason requiring a statute imposing special internal revenue taxes to be construed liberally in favor of the Government, but it should be construed fairly and judicially with reference to both parties. (*De Bary v. Souer,* Cir. Ct. of Ap., 5th Cir., 101 Fed. 425, at p. 428.)

The literal meaning of words employed in statutes levying taxes is most important; for such statutes are not to be extended beyond the clear import of the language used. * * * Where the words in a statute levying taxes are doubtful, the doubt must be resolved in favor of the taxpayer. (*United States v. Merriam,* 269 U. S. 179 at pp. 187-188, 44 S. Ct. 69.)

On January 10, 1950, the U. S. District Court, for the northern district of Iowa, handed down its decision in the case of *Geer, et al. v. Birmingham,* 88 Fed. Supp. 189, which was the second time the courts were called upon to review the effects of the Commissioner's unpublished change in his interpretation of his outstanding Regulation. This case was decided in favor of the taxpayer, and against the Government.

In the *Geer* case, *supra,* (pp. 195-215) the District Court Judge carefully reviewed the history of the "cabaret tax" legislation commencing with the year 1917; the generally accepted meaning of the words "cabaret" and "dance hall" or "ballroom", and the distinguishing features of these establishments. Also, the Commissioner's Regulations promulgated under the provisions of the Revenue Act of 1941, and continued without change for a long period of years.

He distinguished the case of *Avalon Amusement Corporation, supra,* on the ground, among others, that the Court, in that case, was not informed of the facts with respect to the Regulations of the Commissioner of Internal Revenue which had long been in force and effect, and knew only of the very recent tentative change in the Commissioner's position, which, at that date, had not been publicized (pp. 228-229).

Uncontradicted testimony was introduced in the trial of the *Geer* case (p. 220) to the effect that Collectors of Internal Revenue in the nearby states of Illinois, Minnesota, and Kansas were not demanding, or collecting a cabaret tax from the operators of dance halls and ballrooms. The Trial Court commented that the collection of Federal excise tax is not a matter of "local option." It called attention to the fact that the record did not show "that the Commissioner of Internal Revenue, or the Deputy Commissioner of Internal Revenue has, as yet, given

notice over the signatures of either of them" that a change was being made in the interpretative rulings and administrative practice that had been followed for a long period of time in regard to the liability of operators of ballrooms of the type and kind operated by the plaintiffs, for the so-called cabaret tax.

The decision of the District Court in *Geer, et al. v. Birmingham, supra,* is deemed to be of considerable importance for the reason that the House Ways and Means Committee, and the Senate Finance Committee, in their respective reports on the Revenue Act of 1951, make specific reference to that decision and state that it correctly reflected the intent and purpose of Congress in enacting the "cabaret tax" legislation.

Upon appeal by the Government, the Circuit Court of Appeals, 8th Circuit, reversed the decision of the District Court in *Geer, et al. v. Birmingham, supra,* (*Birmingham v. Geer, et al.,* 185 F. 2d 82; November 10, 1950), and followed the decision of the Circuit Court of Appeals, 7th Circuit, in *Avalon Amusement Corporation v. United States.*

Nothing has been found in the Circuit Court's decision in *Birmingham v. Geer, et al., supra,* which would indicate that any consideration was given to the long line of decisions of the courts holding that reenactment by Congress, without change, of a statute which had previously received long-continued executive construction is an adoption by Congress of such construction, unless the contrary is clearly indicated. (*Lykes v. United States,* 343 U. S. 118, p. 127, and cases cited therein; *Helvering v. Winmill,* 305 U. S. 79; *Swigert v. Baker,* 229 U. S. 187; *Commissioner v. Pittsburgh & West Virginia R. R. Co.* (U. S. C. C. A. 3d Cir.), 172 F. 2d 1010; *Oil Shares, Inc.,* 29 B. T. A. 664.)

And in *Brewster v. Gage,* 280 U. S. 325, at page 336, the same court said:

> "It is the settled rule that the practical interpretation of an ambiguous or doubtful statute that has been acted upon by officials charged with its administration will not be disturbed except for weighty reason." (P. 336) Also, that "A reversal of that construction would be likely to produce inconvenience and result in inequality." (P. 336.)

The case of *Helvering v. Bliss,* 293 U. S. 141, at page 151, presented the question whether deductions on account of charitable contributions are to be taken from net income as defined by Section 21, or from ordinary net income as defined by Section 101(c)(7) of the Revenue Act of 1928. The Commissioner of Internal Revenue had ruled that the taxpayer (respondent), in computing the 15% deduction allowable for charitable contributions, could not use the amount of net income as defined by Section 21 but was limited to the amount of ordinary net income which excluded net capital gains. In affirming the decision of the Circuit Court of Appeals, 2d Circuit, the Supreme Court said:

> "Moreover, from 1923 to 1932 the Commissioner uniformly ruled that the deduction for charitable contributions was to be taken from net income before computation of the tax and hence in whole from ordinary net income. The reenactment in later Acts of the section permitting the deduction indicated Congressional approval of this administrative interpretation,"

To the same effect: *Old Colony Trust Co. v. Comm.,* 301 U. S. 379, at page 384.

In the case of *Helvering v. Reynolds Tobacco Co.,* 306 U. S. 110, at page 116, the question presented to the

court was whether an amendment to the Regulations adopted by the Treasury Department on May 2, 1934, could be applied retroactively to the year 1929. The court held that the respondent's tax liability for the year 1929 is to be determined in conformity to the regulation then in force. After making reference to Section 605 of the Revenue Act of 1928, which section is substantially similar to Section 3791(b) of the Internal Revenue Code, (1939) relating to the retroactivity of regulations or rulings, the Court said:

> "It is clear from this provision that Congress intended to give to the Treasury power to correct misinterpretations, inaccuracies, or omissions in the regulations and thereby to affect cases in which the taxpayer's liability had not been finally determined, unless in the judgment of the Treasury, some good reason required that such alterations operate only prospectively. The question is whether the granted power may be exercised in an instance where, by repeated reenactment of the statute, Congress has given its sanction to the existing regulation.
>
> "Since the legislative approval of existing regulations by reenactment of the statutory provision to which they appertain gives such regulations the force of law, we think that Congress did not intend to authorize the Treasury to repeal the rule of law that existed during the period for which the tax is imposed. We need not now determine whether, as has been suggested, the alteration of the existing rule, even for the future, requires a legislative declaration or may be shown by reenactment of the statute unaltered after a change in the applicable regulation."

Under the published Regulation of the Commissioner, which Regulation had been approved by the Secretary of the Treasury, and was in force and effect during the

taxable years involved herein, the Appellant's establishment was not taxable as a cabaret. (*Geer et al. v. Birmingham, supra.*)

In the case of *Keystone v. Automobile Club v. Commissioner,* 181 F. 2d 402, the Circuit Court, in its opinion, stated that:

> "The Commissioner urges upon us that these regulations are higher in the administrative hierarchy than memoranda coming from his office."

The basis for the reversal of the decision of the U. S. District Court in *Geer, et al. v. Birmingham,* by the 8th Circuit Court of Appeals (*Birmingham v. Geer, et al., supra*), is believed to be found in the following paragraph contained in the Court's decision, (p. 85):

> "It is important that, so far as possible and particularly with respect to questions affecting the administration of taxing statutes, there should be uniformity of decisions among the circuits. We would not be justified in refusing to follow the decision of the Circuit Court of Appeals in the Avalon case unless convinced that it was clearly wrong." (Citing cases.)

The Committee reports of the House Ways and Means Committee and the Senate Finance Committee, on the bill, which was later enacted as the Revenue Act of 1951, contains the clearly worded statement that the decisions of the Circuit Court of Appeals, 7th Circuit, in the case of *Avalon Amusement Corporation, supra,* and that of the Circuit Court of Appeals, 8th Circuit, in *Birmingham v. Geer, et al., supra,* did not reflect the intent and purpose of Congress in enacting the cabaret taxing statute.

(5) Congress, Speaking Through the Members of the House Ways and Means Committee on the Revenue Act of 1950 and Speaking Through the Members of the House Ways and Means Committee and the Senate Finance Committee, on the Revenue Act of 1951, Declared That It Was Its Intent and Purpose in the Passage of Section 1700(e) of the Revenue Code of 1939, as Amended in 1941, That Dance Halls and Ballrooms Similar to That Conducted by the Taxpayer Were Not Included Within the Meaning of the Term "Roof Garden, Cabaret, or Similar Place."

Subsequent to the decision of the U. S. District Court in the case of *Geer, et al. v. Birmingham, supra,* representatives of the National Ballroom Operators Association personally appeared before the Committee on Ways and Means of the House of Representatives, which then was considering HR 8920 of the 81st Congress, 2nd Session, which became the *Revenue Act of 1950.*

After making a brief oral statement they submitted a written memorandum requesting that the statute imposing a tax on cabarets be clarified to confirm that it was the intent of Congress to exclude ballrooms and dance halls from classification as cabarets, or similar places which were subject to the cabaret tax, because of the decision of the court in *Avalon Amusement Corporation, Inc. v. Commissioner, supra.* The case of *Geer, et al. v. Birmingham, supra,* was cited as a correct interpretation of the intent and purpose of Congress in enacting the legislation involved.

Apparently in accordance with this request, HR 8920 revised Section 1700(e) to provide that:

> "In no case shall such term include any ballroom, dance hall, or other similar place where the serving or selling of food, refreshment, or merchandise is

merely incidental, unless such place would be considered, without the application of the preceding sentence, as a 'roof garden, cabaret, or other similar place.' "

The Report of the House Ways and Means Committee (Internal Revenue Cumulative Bulletin 1950-2 p. 432), insofar as it relates to this change in the wording of the statute, reads:

> "The purpose of this amendment is to make it clear that the principles set forth in the case of Geer v. Birmingham, Collector of Internal Revenue, United States District Court, Northern District of Iowa, decided January 10, 1950, are controlling in the determination of whether an establishment is operating as a cabaret or a dance hall, and to avoid the broad construction placed upon the statute in the case of Avalon Amusement Corp., v. U. S. (165 Fed. (2d) 653) which requires that dance halls and similar establishments be taxed as cabarets, even though the serving or selling of food, refreshments, or merchandise, is merely incidental."

After HR 8920 passed the House of Representatives it went to the Finance Committee of the U. S. Senate, where it was being considered at the time the Korean war broke out. There is little doubt that the change made in the wording of the statute by the House of Representatives would have been adopted by the Senate, and become the declaration of Congress at that time, but for the emergency.

It is unfortunate that the Senate Finance Committee, because of the Korean war situation, put aside the consideration of this provision of the House bill, acting on

the erroneous assumption that, at the administration's request, it was shelving legislation granting relief from excise tax inequities, whereas, in fact, the relief sought was not relief from an excise tax inequity, but merely a confirmation of what had always been the intent of Congress as shown by the legislative history of Section 1700(a) of the Internal Revenue Code, which history is set forth in detail in Judge Graven's opinion in the case of *Geer, et al. v. Birmingham, supra,* pages 195 to 215.

When the Revenue Bill of 1951 was presented to the House Ways and Means Committee, in February, 1951, the same representatives of the National Ballroom Operator's Association again appeared before the Committee, and submitted a new written statement setting forth the history of the action taken on their request by the House, in the Revenue Bill of 1950, and the failure of the Senate to act thereon and the reasons for such failure.

They presented to the Committee notices received from a substantial number of operators of dance halls and ballrooms in the middle western area, stating that they were closing up their establishments because of the imposition of a cabaret tax which made it impossible for them to operate. Many of the dance halls had been converted for use in other lines of business.

The House of Representatives again revised Section 1700(e)(1) of the Internal Revenue Code in order to declare, with greater certainty, the intent and purpose of Congress in enacting the said statute.

The published records of the hearing disclose that Secretary of the Treasury Snyder was the first witness

called to testify before the Committee with respect to taxation problems. The attitude of the Committee, insofar as excise taxes are concerned, may be judged from the following statement made by Mr. Dingell, a member of the Committee, to the Secretary:

> "* * * I am bitterly opposed to any further excises, spreading the basis to include any more, or levying any additional taxes on those who are now paying them; * * *."

The Report of the House Ways and Means Committee contains the following comment on Section 404 of the Revenue Act of 1951:

> "Section 404 of your Committee Bill relates to the application of the 20% tax on cabarets to ballrooms and dancing halls. Some courts have construed the cabaret tax to apply in the case of ballrooms and dancing halls merely because it was possible to purchase incidental refreshments, services, or merchandise in such places. This bill amends Section 1700(e) of the Code to provide that the cabaret tax shall not apply in such cases. It is estimated that the revenue effect of this provision will be negligible.
>
> "This section amends Section 1700(e)(1) of the Internal Revenue Code to exempt from the cabaret tax bona fide dance halls, ballrooms, and other similar places where the serving or selling of food, refreshments, or merchandise is merely incidental to the music and dancing privileges furnished unless the conduct of the place is such as to bring it within the normal concept of a roof garden, cabaret, or similar place. * * *
>
> "The purpose of this amendment is to make it clear that the principles set forth by the District Court in

the case of Geer v. Birmingham (88 Fed. Supp. 189) are controlling in the determination of whether the establishment involved is operating as a cabaret or as a dance hall, and to avoid the broad construction placed upon the statute in the case of Avalon Amusement Corporation v. United States (165 Fed. (2d) 653, and in the Court of Appeals decision reversing the decision of the District Court in the Geer case (Birmingham v. Geer, 185 Fed. (2d) 82) which require that dance halls and similar establishments be taxed as cabarets, even though the serving or selling of food, refreshments, or merchandise is merely incidental."

Section 404 of the Revenue Act of 1951 reads:

"(a) Ballrooms and dance halls.—Section 1700(e)(1) (relating to tax on cabarets, roof gardens, etc.) is hereby amended by inserting after the second sentence thereof the following new sentence: 'In no case shall such term include any ballroom, dance hall or other similar place where the selling of food, refreshment, or merchandise is merely incidental, unless such place would be considered, without the application of the preceding sentence, as a roof garden, cabaret, or other similar place.' "

In *Penn Mutual Life Ins. Co. v. Lederer,* 247 Fed. 559, at page 561, the court said:

"It is the American doctrine that the people govern themselves, and a vital part of that principle is that they, and they only, tax themselves. No tax can in consequence be imposed except by their representatives in Congress, and a further negative consequence is that no tax can be imposed by the courts or the executive, through judicial or administrative construction of the statutes."

(6) The Action of the Congress in Relation to Said Section 1700(e) Was Not a Change or Amendment of the Law as Set Forth in Said Section, but Was Merely a Declaration and Clarification of the Existing Law.

Some confusion apparently has arisen with respect to the effect to be given to Section 404 of the Revenue Act of 1951, by reason of the following statement regarding its effective date:

> "The amendment made by this section shall take effect at 10 A.M., on the first day of the first month which begins ten days after the enactment of this bill."

After having declared that it was not the intent and purpose of Congress to apply the cabaret tax in the case of ballrooms and dancing halls merely because it was possible to purchase incidental refreshments, services, or merchandise at such places, it is very evident that Congress was not declaring a new policy, but only providing a more clearly defined expression of the purpose and intent of the prior law.

The statement made in the Report of the House Ways and Means Committee that: "It is estimated that the revenue effect of this provision will be negligible" would seem to have been based on the understanding that the cabaret tax had been collected only from ballrooms and dance halls located within the respective districts of the Seventh and Eighth Circuit Courts of Appeals, since it is obvious that were such taxes to be applied to all ballrooms and dance halls within the United States, in accordance with the ruling issued over the signature of Deputy Commissioner Valaer, under date of January 19, 1951, and, as has been done in the instant case, collected for years prior to the release of that letter ruling, the increase

in revenue could reasonably be expected to amount to much more than double the tax then being collected from cabarets, roof gardens, and similar places.

In the case of *Jordan v. Roche,* 228 U. S. 436, the following question was certified to the U. S. Supreme Court: Was bay rum imported from Porto Rico subsequent to the passage of the Act of April 12, 1900, and prior to the passage of the act of February 4, 1909, subject to the payment of a tax equal to the Internal Revenue tax imposed in the United States under Sections 3248 and 3254 on "distilled spirits, alcohol and alcoholic spirit?"

Prior to the 1909 Act, the Court of Appeals for the Second Circuit had answered this question in the negative. (*Anderson v. Newhall,* 161 Fed. 906.) But when the same exact question arose in litigation occurring after the 1909 Act, the Court of Appeals for the Second Circuit was somewhat uncertain about its prior decision. It certified the question to the Supreme Court.

Mr. Justice McKenna, in his opinion, said:

> "It is insisted that this act is a declaration by Congress that bay rum was not subject to tax under prior statutes. The history of the act rejects the contention and manifests that the act was passed in consequence of the decision in Newhall v. Anderson, and other decisions to which we have referred. The law was not the declaration of a new policy but a more explicit expression of the purpose of the prior law made necessary by judicial construction of that law."

The question whether an amendment made by Congress to an existing statute was effective only from the date of adoption of such amendment or was merely declaratory of the prior law was again presented to the U. S. Su-

preme Court in the case of *Commissioner v. Estate of Harry Holmes,* 66 S. Ct. 257 (Jan. 2, 1946). The Circuit Court of Appeals, Fifth Circuit, and the Tax Court of the United States had held that the amendment made a substantial change in the law.

The Supreme Court found, as a fact (pp. 482-483) that:

> "In 1936, immediately following the White decision, Congress revised Section 302(d) by rewriting it into two separate paragraphs relating to 'revocable transfers,' one applying to transfers after June 22, 1936, the other to transfers on or prior to that date . . . For present purposes the difference claimed to be important consisted in charging the phrase 'to alter, amend, or revoke' applying to transfers on or prior to June 22, 1936, so that in Section 811(d)(1) it reads 'to alter, amend, revoke, or *terminate,*' as to transfers after that date.
>
> "However, Section 811(d)(2) governs the transfer in this case since it was made in January, 1935, prior to the dividing date. And the question most mooted has been whether the change was one of substance or was only a clarifying amendment . . ."

The Report of the House Ways and Means Committee with respect to the amendment involved in the *Holmes* case as quoted therein (p. 488) reads as follows:

> "Another change made in subsection (a) of Section 206 has been to expressly include a power to terminate along with the powers to alter, amend or revoke. In the case of White v. Poor, supra, the Supreme Court did not pass on the question whether the power to terminate was included in the language relating to a 'power to alter, amend, or revoke.' Since in substance a power to terminate is the equivalent

of a power to revoke, this question should be set at rest. Express provision to that effect has been made and it is believed that it is declaratory of existing law."

In answer to the taxpayer's contention that the said amendment was effective only from the date of its adoption, the Supreme Court said (p. 487):

"We think the history gives the opposite story. The 1936 revision resulted from the White decision which raised doubt whether Congress had included the power to terminate in the words 'alter, amend, or revoke.' To clarify the matter Congress removed all doubt for the future by enacting Section 811(d)(1). At the same time it adopted Section 811(d)(2) which retained the earlier phrasing. This was from concern that retroactive application of Section 811 (d)(1) should not impose taxes on prior transfers not comprehended by the prior law, as the concluding sentence of Section 811(d)(2) shows. Nothwithstanding this and the doubt created by White v. Poor, supra, the Report of the Committee on Ways and Means of the House of Representatives expressly states that the addition of 'or terminate' in Section 811(d)(1) was 'declaratory of existing law.'"

Since the House Ways and Means Committee and the Senate Finance Committee, in their respective reports on the Revenue Bill of 1951 declared that the decision of the U. S. District Court in *Geer, et al. v. Birmingham, supra,* correctly reflected their intent and purpose in enacting the statute imposing a tax on cabarets, roof gardens, and similar places, the only reason for Congress to make a change in the prior law was to make more explicit its original intention to exclude ballrooms and dance halls from being subject to a cabaret tax, unless such place

would be considered to be a cabaret, roof garden, or similar place.

As the Supreme Court found in the cases of *Jordan v. Roche, supra* (pp. 445-446), and *Commissioner v. Estate of Harry Holmes, supra,* Congress deemed it advisable to change the language of the statute because the judicial construction of the statute imposing a tax on cabarets, by the Circuit Court of Appeals, 7th Circuit, in the case of *Avalon Amusement Corporation;* and by the Circuit Court of Appeals, 8th Circuit, in *Birmingham v. Geer, et al,* did not reflect its intent and purpose.

Following the enactment of the Revenue Act of 1951, the Commissioner of Internal Revenue has agreed that the appellant is not subject to the excise taxes (cabaret) complained of in this proceeding.

In the case of *Peony Park, Inc. v. O'Malley,* 121 Fed. Supp. 690 (p. 692) (June 10, 1954) (U. S. D. C., District of Nebraska), the taxpayers contended that the so-called "amendment" made by Section 404 of the Internal Revenue Act of 1951 to Section 1700(e)(1) of the Internal Revenue Code of 1939, as amended, was merely declaratory of the existing law.

The Court, in that case (pp. 694-695), found that notice of the Commissioner's change in his interpretation of the Regulations was given to taxpayers in the State of Nebraska, about September 1, 1948, and cabaret taxes were collected thereafter.

The Court (p. 694) referred to letters sent to various Collectors of Internal Revenue by the Deputy Commissioner, on January 19, 1951, advising them that as a result of the decision in *Birmingham v. Geer, supra,* arrangements should be made to notify all dance halls and ballrooms, in which food and refreshments are sold during the time music and dancing privileges are furnished is a

"roof garden, cabaret, or other similar place." Most of the notices were found by the Court to have advised the taxpayers of their liability effective February 1, 1951. The Court then said (p. 695):

> "In other words, the Commissioner adopted the policy in many states of collecting the tax only for periods after February 1, 1951, while in Nebraska he adopted a policy of collecting the tax as far back as 1948."

Counsel for the taxpayers relied upon the case of *Jordan v. Roche, supra,* and the trial court made the following comment with respect to its applicability (p. 694):

> "The case is in point except for one rather important factor. This is not the Supreme Court; nor is it the Court of Appeals. The Court of Appeals may entertain doubts as to the correctness of its previous decisions. It may even overrule them if it so desires. But this court may not. It must follow with humble respect the decisions announced by the Court of Appeals in *this* circuit."

The District Court, in deciding the case in favor of the Government did not discuss the question whether the amendment was an expression of a new policy, or merely a declaration of the existing law, but ruled (p. 693), that the amendment was not retroactive, citing Sutherland, Statutory Construction (3rd Ed. by Horack).

> "The usual purpose of a special interpretive statute is to correct a judicial interpretation of a prior law which the Legislature determines to be inaccurate. Where such statutes are given any effect, the effect is prospective only." (Citing *United States v. Gilmore,* 8 Wall. (75 U. S.) 330.)

It may, or may not, be significant that the U. S. Supreme Court, in deciding that the "special interpretive

statutes" to correct judicial interpretations determined by the Legislature to be inaccurate, which were under consideration in the cases of *Jordan v. Roche, supra,* and *Commissioner v. Estate of Harry Holmes, supra,* were merely declaratory of the existing law, failed to comment on the pronouncement of Sutherland on the subject of Statutory Construction, although its decisions were in direct conflict with the views expressed by him.

Upon appeal to the Circuit Court of Appeals, 8th Circuit, that court attempted to distinguish the case of *Jordan v. Roche, supra,* by stating (p. 672) that:

> "In the Jordan case the Supreme Court disagreed with the prior circuit court decisions which induced the amendment. In the present cases the amendment was intended to change the law as interpreted by the Courts of Appeals of this Circuit and Seventh Circuit. There has been no Supreme Court determination that the interpretations made in the Geer and Avalon cases are erroneous. Consequently, in our present cases, the amendment changes rather than clarifies the prior statute."

The language of the House Ways and Means Committee, and the Senate Finance Committee clearly shows that the said amendment was intended to declare the interpretations of the Courts of Appeals of the 7th and the 8th Circuits to be erroneous, and that they did not reflect the intent and purpose of Congress in enacting the prior law.

While it is true that there has been no Supreme Court determination that the interpretations made by the Circuit Courts of Appeals in the *Avalon* and *Geer* cases are erroneous, the Supreme Court has declared that the primary rule of construction is to ascertain and give effect to the will and intent of Congress. (*United States v. Rosenblum Truck lines,* 315 U. S. 50, at p. 53 to 55, incl.)

The intention of the lawmaker controls in the construction of taxing statutes as it does in the construction of other statutes. (*Helvering v. Stockholders Enskilda Bank,* 293 U. S. 84, 55 S. Ct. 50.)

Expressions of opinion expressed by a Congressional Committee which have discussed an act of Congress in a report are entitled to weight in construing the law. (*Penn Mutual Life Insurance Co. v. Lederer,* 247 Fed. 559 (Circuit Court of Appeals, 3rd Circuit), affirmed 252 U. S. 523.)

And the Supreme Court has held it to be reversible error to refuse to consider the Congressional Committee Reports as an aid in ascertaining the intent of Congress. (*Harrison v. Northern Trust Co.,* 317 U. S. 476, p. 480.)

Had the Supreme Court seen fit to review the case of *Birmingham v. Geer, et al.,* in the light of the House Ways and Means Committee Reports on the Revenue Bills of 1950 and 1951, there is no reason to believe that it would have refused to consider the Reports as an aid in ascertaining the purpose and intent of Congress in enacting the law providing for a tax on cabarets, roof gardens, and similar places.

In its opinion rendered in the case of *Peony Park, Inc., supra,* the Circuit Court discusses the case of *Harrison v. Northern Trust Co.,* 317 U. S. 476, which holds that the legislative history of an act should be examined. It is believed that a careful reading of the Supreme Court's decision in that case, and the Report of the House Ways and Means Committee on the Revenue Bill of 1932, could reasonably lead to different conclusions than those expressed by the Circuit Court.

That Congress, in enacting Section 807 of the Revenue Act of 1932, which was involved in *Harrison v. Northern Trust Co., supra* (p. 480), intended to, and did, in fact

change the law is clearly evident from the following extracts from the Report of the House Ways and Means Committee relating to Section 807.

> "The purpose of this amendment is to limit the deduction for charitable bequests, etc., to the amount which the decedent has in fact and in law devised or bequeathed to charity.
>
> "Under the existing law, most absurd results are reached. Thus, if a testator gives his residuary estate to charity and directs that the Federal estate tax and the State inheritance taxes shall be paid out of such estate, the result may be that nothing is left for charity. In such case, notwithstanding nothing is given to charity and charity receives nothing, still there must be deducted from the gross estate a wholly fictitious sum, namely, that he would have given to charity had he not directed otherwise. * * *"

The balance of the Report clearly discloses the great dissimilarity between the legislative history in the *Harrison* case, *supra,* and that in the *Peony Park, Inc.* cases.

In *Swigert v. Baker,* 229 U. S. 187, at p. 190, the Supreme Court said:

> "The well defined principle announced by all the courts and text writers is that prior or subsequent legislation may be resorted to to solve but never to create an ambiguity."

And at p. 191:

> "Reports of committees may be used as an aid to construction, where there is an ambiguity. Johnson v. Southern Pacific Ry. Co., 196 U. S. 20. See also Cong. Record; Vol. 35, pt. 7, pp. 6683.
>
> "While courts have said that resort is not to be had to the debates in legislative bodies to determine

the construction of an act, courts do repeatedly resort to that very source of enlightenment. Wadsworth v. Boysen, 148 Fed. Rep. 771; Binns v. U. S., 194 U. S. 486; Roberts v. Pac. Co., 186 Fed. Rep. 938; Jennison v. Kirk, 98 U. S. 453; United States v. Wilson, 58 Fed. Rep. 768; Ex parte Farley, 40 Fed. Rep. 66; Simonds v. St. Louis, etc., 192 Fed. Rep. 353."

In *Harrison v. Northern Trust Co., supra,* at p. 479, the Supreme Court said:

"The court then followed Edwards v. Slocum, 264 U. S. 561, where, under substantially identical facts and in the absence of a statute such as Section 807; the instant issue was decided against the Government. In so doing the court below refused to examine the legislative history of Section 807, on the ground that the section was unambiguous.

"But words are in exact tools at best, and for that reason there is wisely no rule forbidding resort to explanatory legislative history no matter how clear the words may appear on 'superficial examination.' U. S. v. American Trucking Association, 310 U. S. 534, 543-544. See also U. S. v. Dickerson, 310 U. S. 554, 562."

The trial court [Tr. of R. p. 18] has stated that:

"In the light of these decisions (Avalon Amusement Corp. v. U. S., supra, and Birmingham v. Geer, supra), the decision in the lower court in Geer v. Birmingham, D. C. Ia., 1950; 88 Fed. Supp. 189, which was specifically reversed by the Court of Appeals in Birmingham v. Geer, supra, and the fact that a Committee of the Congress, subsequent to the promulgation of the decisions, may have stated that the lower court's opinion accords with congressional intent, while those of the Courts of Appeals do not, loses all meaning."

The Supreme Court has uniformly ruled that the intent of Congress governs the interpretation of a taxing statute. That Court has likewise held that it is reversible error to refuse to consider the Congressional Committee reports to determine the intent of Congress. (*Harrison v. Northern Trust Co., supra.*)

And the Supreme Court has held that prior or subsequent legislation may be resorted to for the purpose of solving an ambiguity. (*Swigert v. Baker, supra,* p. 190.)

No authority has been referred to by the trial court which would justify ignoring the expressed intent of Congress in enacting the statutes imposing a cabaret tax, or which grants precedence to the interpretation of a taxing statute by any U. S. Circuit Court of Appeals over such expressed Congressional intent.

The statement of the trial court [Tr. of R. p. 18] that:

> "And where the language is clear (p. 21) legislative history before the passage of the Act loses all significance, and attempted legislative interpretation after the passage of the Act carries no weight. (See Greenwood v. U. S., 1956, 350 U. S. 366, 374; U. S. v. McKesson & Robbins, 1956, 351 U. S. 305, 315.) The Congress of the United States did make its interpretation of the Section under consideration prevail in the only manner permitted,—namely, by amending it in 1951 so as to specifically exempt from the tax ballrooms, dance halls, or other similar places where the service of food and refreshments are incidental only."

The Trial Court, in finding the language of the statute involved herein to be clear, appears to have differed, in this respect, from the finding of the 7th Circuit Court of Appeals in *Avalon Amusement Corp. v. United States, supra,* and the Commissioner of Internal Revenue.

The House Ways and Means Committee, in its report on the Revenue Act of *1950,* and the House Ways and Means Committee and the Senate Finance Committee, in their respective reports on the Revenue Act of 1951, declared their intent and purpose in enacting the legislation involved herein, rather than interpreting their statute which was a function of the Commissioner of Internal Revenue and the courts, save that neither the courts nor the executive, through judicial or administrative construction of the statutes, can impose a tax. (See *Penn Mutual Life Ins. Co. v. Lederer, supra,* p. 561.)

Since regulations promulgated by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, are for the purpose of interpreting the statutes, it is certain that where the language of the statute is clear, there is no need for interpretative regulations.

In the case of *Avalon Amusement Corp. v. United States, supra,* the U. S. Circuit Court said:

> "The provisions of the statute under consideration became effective in its present form October 21, 1942 . . . It is not free from ambiguity. Since the statute is ambiguous in its definition of a roof garden, cabaret, or other similar place, and does not attempt to define a 'public performance,' it is a proper subject for an interpretative regulation."

See history of the law and regulations in *Geer v. Birmingham,* 88 Fed. Supp. 189, at pp. 195 to 215.

The authority for making such regulations is vested in the Commissioner of Internal Revenue; which regulations were issued and continued in effect without change for a long period of years during which time Congress reenacted Section 1700(e) of the taxing statutes several times without substantial change.

During this period rulings were issued by him under those regulations through the early months of 1947, notify-

ing operators of dance halls and ballrooms similar to that operated by the appellant, that they were not taxable as cabarets, which are in direct conflict with the instructions issued to Collectors of Internal Revenue in a few of the states in the United States some time in 1947, by some delegate of the Commissioner of Internal Revenue below the rank of Deputy Commissioner.

If further evidence is needed as to the doubt which arose in the mind of the Commissioner as to the correct interpretation of Section 1700(e) with respect to taxing dance halls and ballrooms, it can be found in the letter issued to all Commissioners of Internal Revenue under date of January 19, 1951, which was published in the report of *Peony Park v. O'Malley, supra.* In view of this fact, it is clear that there is ample justification for examining the legislative history of the statute and on authority of *Harrison v. Northern Trust Co., supra,* it is reversible error to refuse to consider it.

It is deemed to be of great significance that the Commissioner has never published notice of any change in his regulations, and has not published any ruling attempting to modify those regulations or his interpretation thereof.

In the foreword to all Cumulative Bulletins issued by the Internal Revenue Service, the attention of all officers and employees of the Bureau of Internal Revenue is directed to the instruction that unpublished rulings are not to be relied upon in the settlement of cases.

It is evident that in the cases of *Avalon Amusement Corp. v. United States, supra,* and *Birmingham v. Geer, supra,* the Courts did not have for consideration a published ruling of the Commissioner of Internal Revenue, or, insofar as the record discloses, an unpublished ruling issued over the signature of the Commissioner, or the Deputy Commissioner of Internal Revenue.

The trial court apparently understood that it was being asked to give retroactive effect to the Revenue Act of 1951. Such was not the case. The Court was asked to find that the change in the language of Section 1700(e) of the Internal Revenue Code, by the Revenue Act of 1951, was merely declaratory of the existing law, on authority of *Jordan v. Roche, supra,* and the *Commr. v. Estate of Harry Holmes, supra;* which cases the trial court did not discuss or attempt to distinguish.

Counsel for the Government apparently agrees that the change made in the language of Section 1700(e) I. R. C. by the Revenue Act of 1951, was merely declaratory of the existing law [Tr. of R. p. 53].

The case of *United States v. McKesson & Robbins* (1956), 351 U. S. 305, 315, cited in the trial court [Tr. of R. p. 18] presented to the court the question as to the scope of the exemption from the antitrust laws provided by "fair trade" legislation. No question of the interpretation of a taxing statute was involved. It is held to be clearly inapplicable to the instant case.

The case of *Greenwood v. United States* (1956), 350 U. S. 366, 374, cited in the trial court [Tr. of R. p. 18] involved the construction and constitutional validity of the Act of September 7, 1949; 63 Stat. 686, now codified in 18 U. S. C., Sections 4244-4248; U. S. C. A., Sections 4244-4248, "To provide for the care and custody of insane persons charged with or convicted of offenses against the United States, and for other purposes." A careful study of the court's opinion discloses no statements which might be applicable to the situation in the instant proceedings.

It is too well established to require the citation of cases, that the denial of certiorari in any case by the U. S. Supreme Court does not signify approval of the decision appealed from.

Summary.

(1) The first question to be answered in this case is whether the Appellant's ballroom was a "cabaret," a term which has acquired a well established meaning. The word is defined as a "restaurant which provides entertainment by singers, dancers, etc." In the case of *Geer et al. v. Birmingham, supra,* considerable testimony was given by persons found to be qualified to give opinions as to the difference between a ballroom or dance hall, and a cabaret.

The Court, in the case of *Philadelphia Storage Battery Co. v. Lederer,* 21 F. 2d 320, at p. 321, after stating that tax laws should be intelligible to those who are expected to obey them, said: "This means that the phrases of the law are to be given the meaning they have in the trades concerned. One sometime helpful attitude of mind in the interpretation of statutes is for the reader to get the viewpoint of the legislator."

The Appellant's establishment was a ballroom licensed and operated as such. It was not a restaurant, and the management provided no entertainment by singers, dancers, etc.,—only an orchestra to furnish music for dancing for those who had paid admissions charge on which a Federal admission tax was collected and paid over to the Government. No tables or chairs were provided within the ballroom, and no food or drinks were served or could be brought within such ballroom. Refreshments were available for purchase at prevailing street prices, *if a patron desired to avail himself of this privilege,* in a room adjoining the ballroom but separated therefrom by a partition, save for a relatively small opening which Appellant was required to maintain by order of the Los Angeles Fire Department.

(2) Under the regulations promulgated by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, interpreting the provisions of Section 1700(e) of the Revenue Act of 1941, providing for a separate tax on cabarets, which amended Section 1700(e) of the then existing law, the Commissioner construed such statute as not being applicable to dance halls and/or ballrooms conducted in a manner similar to the one involved herein.

Such regulations continued in effect for a long period of years, during which time Congress on several occasions, reenacted the statute presently in controversy without substantial change. Those regulations have not been amended by the Secretary of the Treasury.

(3) The cabaret tax in question was to be collected for the Government by the proprietor of the cabaret who was authorized to pass it on to the patrons; and where such tax was applicable, the proprietors of cabarets did so.

From time to time Collectors of Internal Revenue in a few of the states lying within the area included within the jurisdiction of the 7th and 8th Circuit Courts of Appeals, received advice to collect a cabaret tax from operators of dance halls and/or ballrooms located within their taxing districts, if any refreshments were served. In the case of *Geer et al. v. Birmingham, supra,* the court made a finding that no evidence had been offered to show that instructions to Collectors of Internal Revenue were issued over the signature of the Commissioner of Internal Revenue, or the Deputy Commissioner of Internal Revenue.

Under date of January 19, 1951, a letter over the signature of the Deputy Commissioner was mailed to all Col-

lectors of Internal Revenue throughout the country instructing them to demand payment of the cabaret tax from all ballrooms and/or dance halls which sold refreshments. That letter was not published in the Cumulative Bulletin issued by the Commissioner of Internal Revenue in 1951. Following the receipt of such letter, taxes were demanded from the Appellant and paid under protest from his own funds for years prior to the issuance of such letter. As a result of making such instruction retroactive, and thereby penalizing the appellant who was unable to collect such taxes from his patrons for prior years, it is maintained that the Commissioner exceeded his authority. (See *The Lesavoy Foundation v. Commr., supra.*)

(4) No decision or ruling tending to indicate a change in such regulations has been published by the Commissioner in the Internal Revenue Bulletin issued by the Internal Revenue Service for the benefit of officers and employees of the Bureau of Internal Revenue, tax practitioners generally, and taxpayers generally, announcing a change in the Commissioner's long continued interpretation.

(5) When the Committee on Ways and Means of the House of Representatives, in its report on the Revenue Act of 1950, and its report on the Revenue Act of 1951, and the Senate Finance Committee in its report on the Revenue Act of 1951, declared that it was not the intent and purpose of Congress that dance halls and ballrooms similar to that conducted by the appellant should be taxed as cabarets, such reports were entitled to, and should have been given great consideration by the trial court.

(6) The instant case does not present a situation where the contention is made that an amendment to an existing statue should be declared retroactive. It is maintained that the change in the language of Section 1700(e) I. R. C., by the Revenue Act of 1951, was not intended to be anything other than a declaration and clarification of the intent of Congress in enacting the existing statute imposing a tax on cabarets. It is urged that the decision of the U. S. Supreme Court in the *Estate of Harry Holmes, supra,* is directly in point and should be held to be controlling in the instant proceedings.

Conclusion.

For the foregoing reasons, the judgment of the District Court should be reversed.

Respectfully submitted,

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